NO. 80-1560

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

JULIUS CALDER,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW ARE AS FOLLOWS:

Was there sufficient proof by the Government to establish the interference with inter-state commerce which is essential in a Hobbs Act Prosecution?

Did the Trial Court improperly remove the issue of interference with inter-state commerce from the Jury's consideration, resulting in a violation of due process?

Were the Fifth (5th) and Sixth (6th) Amendment Rights of the Petitioner violated by the admission into evidence at the trial of the incriminating statements made by him to an undisclosed government informant while in custody?

A list of all the parties to this proceeding whose judgment is sought to be reviewed is contained in the caption of this case.

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IN THE
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OCTOBER TERM, 1980

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PETITION FOR WRIT OF CERTIORARI
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FOR THE SECOND CIRCUIT

The Petitioner, JULIUS CALDER, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 10, 1981. It appears, that said Petitioner was indicted by a Federal Grand Jury for the Eastern District of New York. The indictment contained three (3) counts founded on 18 USC 1951 and 2 (First Count); 18 USC 1951 and 2 (Second Count), and 18 USC 1951 and 2 (Third Count).

JURISDICTION

The Judgment Order of the Court of Appeals for the Second Circuit was entered on February 10, 1981. This petition for certiorari was filed within sixty (60) days of

that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1). There was no petition filed nor application made for a rehearing in the Court below.

The table of contents and table of authorities required under Rule 33.5 is hereinbefore set forth.

The opinion of the said Court of Appeals is contained in the Judgment Order, dated February 10, 1981, appears in Appendix "A" hereto. No opinion was rendered by the United States District Court for the Eastern District of New York, the Judgment of which was appealed to the United States Court of Appeals for the Second Circuit.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment—"No person . . . shall be compelled in any criminal case to be a witness against himself."

Sixth Amendment—"In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

18 USC 1951—"Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

The Government's case consisted of witnesses who were the owners and employees of two "topless bars" establishments in Manhattan, known as "Adam and Eve" and "Guys and Dolls Au Go Go," who testified that during the period from September, 1978 to October, 1979 co-defendant, Joseph Calder, demanded and received three hundred dollars a week as "protection money" from each business. In general, each of the witnesses testified that Mr. Calder performed no services for the three hundred dollars, a contention vigorously contested on cross-examination and during the defense case. No evidence was presented of physical harm to any individual, or of any property damage in connection with the alleged threats made to certain witnesses.

The Government's investigation of this case began after Robert Fimbel, who used the name Robert Williams while working as night manager in the Adam and Eve bar, was being investigated for paying a bribe to a building inspector in late 1978 (T. 106-107, 261-263).* Fimbel, a police officer concerned with losing his job and his pension, agreed to cooperate with the New York City Department of Investigation and the FBI (T. 266-268).

He told the FBI, and testified at trial, that appellant Joseph Calder had requested "protection money" so that "nothing happens" in the place (T 96-97). After Fimbel spoke to Sol Sitzer, owner of the bar, Calder was paid three hundred dollars a week from the cash register (T. 98). This sum paid to appellant every Wednesday when he visited the bar, usually accompanied by co-defendant George Monge, who carried a gun (T. 102-104).

Although Fimbel was "fearful" that he would be hurt, he himself carried a gun strapped to his ankle and

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* Numbers preceded by "T" refer to pages of trial transcript.

would himself serve as a "bouncer" for rowdy patrons in the bar (T. 129, 227, 258-259). Furthermore, Fimbel testified that he had a personal relationship with Mr. Calder and entered into "serious discussions" with him regarding their going into the bar business together (T. 245-247).

When Fimbel was cooperating with the FBI he taped a conversation with appellant, and testified that although it was important for him to get some threats of extortion on the tape, such threats never materialized (T. 273).

According to the Government, owners Sol Sitzer and Arnold Yourman "independently" came to the FBI not knowing that Fimbel was cooperating. Both Sitzer (who owned Adam and Eve and had an interest in Guys and Dolls) and Yourman, who testified that he owned Guys and Dolls,* testified about payments to Calder based upon fear. They further explained that Adam and Eve, a "juice bar" serving non-alcoholic beverages and Guy and Dolls, which had a liquor license, charged outrageous prices for drinks. For example, a bottle for which they paid $3.00, sometimes sold for $500.00. In most cases the bottles were de-alcoholized wine (T. 496-497). Both owners testified to extensive "skimming" operations which allowed them to take hundreds of thousands of dollars from their business and fail to report this as income on their tax returns (T. 482, 563, 574, 702, 777). Sitzer and Yourman were granted immunity in connection with the instant case, and, in addition neither have filed amended returns or paid back taxes due and owing the Government (T. 617, 745).

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* There was a serious question whether Yourman was merely a "front" for Sitzer at Guys and Dolls since Sitzer was barred by the State Liquor Authority from having any interest in liquor-serving establishment (T. 480-486, 630).

During the course of Arnold Yourman's testimony, it was developed that he had originally sought to borrow money from Calder to "buy out" Sitzer, with whom he was having a dispute. This dispute concerned whether Guys and Dolls dancers should go "bottomless" or stay "topless." Accordingly, Yourman was introduced to Julius "Red" Calder, Joseph Calder's brother. At no time did Calder agree to the requested loan (T. 671-674). According to Yourman, suddenly his employees were threatened by Joseph Calder and he then began paying them money. At the request of the FBI, he subsequently taped conversations with Julius Calder, in which he made no threats, but merely offered to help Yourman with any problems he had (T. 748-749).

When the FBI made its entry into the case, Sitzer and Yourman were told to advise Joseph and Julius Calder that they were being shaken down by a "John Corbo Gang" for "protection money." Payments to Joseph Calder stopped during October of 1979 for three weeks. During this hiatus, agents of the FBI, posing as members of the rival "Corbo Gang," had telephone and in-person conversations with Joseph Calder, Julius Calder and Thomas DiDonato, which were taped and played at the trial (T. 896-914). During the course of these conversations no threats were made by Julius Calder, who indicated that he didn't know what they (the agents posing as extortionists) were talking about (T. 910). It is significant that during the period that the Calders were "fired" by the topless bars, no damage was done and no threats appear on tape. Furthermore, it was Yourman who was calling the Calders for help in handling the "Corbo Gang" situation (T. 912, 804).

Agent John Bonavolonta, posing as John Corbo, visited the 19th Hole Restaurant in Brooklyn, with Agent Lewis Schiliro posing as an associate. There they met with co-defendant Thomas DiDonato and has a conversation

that was taped and played at trial. Bonavolonta testified that he was seeking the meeting with DiDonato. The tenor of the conversation related to theats made to Joseph Calder by the Corbo Gang, which DiDonato was attempting to mediate (T. 1134-1140). At no time were any threats conveyed by DiDonato to the agents (T. 1140).

In October, 1979 all four defendants were arrested in a car outside the Adam and Eve bar after Joseph Calder was alleged to have received a three hundred dollar payment. This money was marked by the FBI, who were surveilling Calder from the time he left the bar to the time of his arrest a few minutes thereafter. None of the marked money was ever seized by the agents although they thoroughly searched the four occupants of the vehicle, and the vehicle itself (T. 1268-1272).

The Government also called as witnesses a number of employees of the bars in question. Mike Levy, a cashier, testified that while he gave Calder money from the register on Wednesday (other employees were also paid on Wednesdays), there were no threats made to him, evidence which directly contradicted the testimony of Sol Sitzer (T. 390-391, 402, 439). Louis Pistone, another employee, testified that Joseph Calder came to Guys and Dolls four or five times weekly, not once a week as prior witnesses testified (T. 651, 660). Rocco Meoli, a night manager at Guys and Dolls, testified that during the three week hiatus period in October, 1979, when Calder was not receiving money, he made requests for the money but made no threats (T. 863-864).

Finally, the Government called numerous surveillance agents who described the entry and exit of Joseph Calder on various Wednesdays and his return to Brooklyn. Apparently no surveillance was conducted on days other than Wednesdays.

Joseph Bennett, was called as a witness by the government, outside of the presence of the Jury and testified as follows:

That on November 1, 1979 he was a prisoner at the Metropolitan Correctional Center (MCC), (1005). At that time he met the appellant, Julius Calder. A conversation ensued in which Calder told Bennett he remembered Bennett through a cousin of Bennetts' (1006). Later that evening, in the TV area of the MCC, Julius Calder and Bennett had a conversation (1007). Bennett asked Calder, *what happened, why he was locked up*? Calder stated:

> "That he was shaking a guy down at a topless place and he went to collect money off the guy and the guy was wired up, and that the F.B.I. had the street blocked off and he got arrested." (1007).

Calder then stated:

> "No, the guy was paying regular and I went this one time to collect from the guy and the F.B.I. had the place set up." (1007-1008).

Calder again stated:

> "That he thought the F.B.I. had a good case against him (1008).

Cross-Examination of Bennett was as follows (1008).

That Bennett was in the MCC two (2) weeks prior to November 1, 1979. That on October 17, Bennett was removed to the MCC with reference to a Federal Indictment dealing with stolen motor vehicles in Interstate Commerce (1009). That Bennett had already spoken to his lawyer with reference to making a deal with the government to testify for the government in the stolen car case (1009).

At this time the Trial Court became aware of that the questioning of Bennett involved an issue as to whether the appellant's rights were violated under the Rule of *Massiah*

377 U.S. 201 (1010). The Court was advised that the appellant had been arraigned and already has an attorney (1010-1011).

The Court then allowed the Assistant United States Attorney to re-examine Bennett on Direct, which was as follows (1011):

That Bennett had been writted to MCC from a New York State Facility (1011). That no one has instructed Bennett to act as an agent to investigate or obtain information regarding crimes committed in MCC or to attempt to elicit admissions from individuals also in MCC (1012).

Cross-examination of Bennett then proceeded (1013).

Bennett, at the time he was brought down to MCC, was looking to make a deal with the government (1013). Bennett denied that it was part of his deal with the government that he was to give all the information that he knew about any and all crimes, not only those related to the stolen car case (1013). Bennett was then questioned as to his written agreement with the government, which stated, in part, the following:

> "Joseph Anthony Bennett agrees to cooperate with agents of the FBI or other law enforcement agencies, agreed to by Joseph Anthony Bennett or as this office may require in investigations arising from information provided by him." (1014)

The witness stated that while he was at MCC he was in the process of making his deal with the government (1015).

At this point, the Court foreclosed any further questioning on the *Massiah* point (1016). Exception was taken to the Court's ruling (1016).

The witness was then called to testify in the presence of the Jury (1029).

His direct testimony was essentially the same as was stated above, outside of the presence of the Jury (1029-1033).

Cross-Examination of Bennett was as follows:

That after being sentenced on various State charges, and being confined to the Ulster County Jail, Bennett indicated to his lawyer that he wanted to make a deal with the federal government (1040). That the deal encompassed the fact that the United States Attorney would ask the State Attorneys to recommend minimum sentences on his three (3) States' cases (1041). That when Bennett was brought down to the MCC, he had not yet been sentenced on the State robbery case (1044). That when he came down to MCC, he said he would do anything that he could to get his State robbery count of a possible 25 year sentence cut down (1045). That after making his deal with the government, Bennett testified against his accomplices in the Federal matter before the Federal Grand Jury (1045-1046). That after such testimony he remained at MCC. That Bennett was still working on his deal with the government at the time he met Calder on November 1, (1047).

Bennett then stated that the next time he was brought over to the United States Attorney's Office it was in relation to the stolen car matter. That at that time he told the United States Attorney what Calder had said to him (1050).

Bennett then remembered that he spoke to United States Attorney about Calder's admissions prior to his testimony before the Federal Grand Jury in the stolen car case (1050-1051). Bennett was shown his agreement with the United States Attorney, which encompassed all other information he may have, other than the information with reference to the information of the stolen car (1053).

The long criminal record of Bennett was then discussed before the Jury (1056-1066).

REASONS FOR GRANTING THE WRIT

POINT I

THE GOVERNMENT'S PROOF WAS INSUFFICIENT TO ESTABLISH THE INTERFERENCE WITH INTER-STATE COMMERCE WHICH IS ESSENTIAL IN A HOBBS ACT PROSECUTION

As the defense attorneys contended in the motion to dismiss the charges, the Government failed to prove that interstate commerce was affected by the alleged extortion scheme. Since the evidence was insufficient, the conviction must be reversed and the indictment dismissed.

The Hobbs Act requires a showing that the extortionate activities affected interstate commerce. *United States v. Merolla,* 523 F.2d 51 (2d Cir. 1975). Though the statute prohibits interference in any way or degree (*United States v. Gambino,* 566 F.2d 414, 418 (2d Cir. 1977), *Carbo v. United States,* 314 F.2d 718, 732 (9th Cir. 1963), nevertheless, the Government must show at least a "potential or subtle" effect. *United Sttes v. Augello,* 451 F.2d 1167 (2d Cir. 1971), *cert. denied,* 405, U.S. 1070 (1972); *United States v. Tropiano,* 418 F.2d 1069, 1076 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970). Proof of a relationship between the extortion and the interstate commerce that is "merely conjectural" is inadequate. *United States v. Merolla, supra,* 523 F.2d at 54. See *United States v. DeGregorio,* 605 F.2d 1184, 1190 (1st Cir. 1979) (the prosecution must show a "realistic probability that an extortionate transaction will have some effect on interstate commerce . . . ").

The evidence in the instant case failed to establish any subtle or potential effect on the interstate commerce conducted by the "Adam and Eve" and "Guys and Dolls" bars. Yourman and Sitzer testified that they purchased from out-of-state food, garbage bags, and bottles of non-alcoholic beverages (for the "Adam and Eve") and domestic champagne (for the "Guys and Dolls"). Neither

owner claimed that he had bought any fewer of these items as a result of the extortion or that such an effect was likely to occur in the future. Of the interstate purchases, the only ones sold by the bars were the beverages. However, the profit margin was so great and the cost so minimal that neither establishment would ever reduce their supply below any possible demand. Bottles that cost Yourman and Sitzer a few dollars were sold for hundreds of dollars, obviously because the customers were paying for the company of the partially clothed waitresses and dancers and not for the value of the carbonated apple juice or other drinks. Under these circumstances, "the depletion of assets theory" (*United States v. Merolla, supra,* 523 F.2d at 54), which applies to normal business operation where depletion of assets generally affects the extortion victim's purchasing power, is simply inapplicable. See *United States v. Addonizio,* 451 F.2d 49, 77 (3d Cir.), *cert. denied,* 405 U.S. 936 (1972).

Furthermore, any depletion of assets caused by $300 per week extortion was more than compensated for by the illegal skimming of Sitzer and Yourman. By their own admissions the two skimmed at least $500 per week from each of the establishments. As the former night manager of the bars testified, the owners actually took in two or three times the amount that they admitted on the stand. Sitzer's and Yourman's low estimates of the profits of the two bars is attributabale to the fact that they were about to negotiate with the IRS for the payment of back taxes and civil penalties. Because they managed to skim far more than they paid in extortion, Sitzer and Yourman's assets were never reduced and their interstate purchases were not effected.

In sum, as a result of the peculiar nature of the business operations in the instant case, it is clear that the extortion payments could not affect the interstate purchases of the two bars. Because of the Government's failure of proof on the issue of the effort upon interstate commerce, the indictment must be dismissed.

POINT II

THE TRIAL COURT IMPROPERLY REMOVED THE ISSUE OF AFFECT ON INTER-STATE COMMERCE FROM THE JURY'S CONSIDERATION, RESULTING IN A VIOLATION OF DUE PROCESS

The Court gave the following charge on the interstate commerce element of the crime:

> Fourth element; the Government must show that interstate commerce was delayed, interrupted or adversely affected. I charge you that if you find that the evidence shows beyond a reasonable doubt that goods were purchased for "Adam and Eve" and "Guys and Dolls" in interstate or foreign commerce and that money or property was obtained from them by extortion, then, as a matter of law, interstate or foreign commerce was affected (T. 1580).

This charge was erroneous and a violation of due process of law because it required the jurors to rely on an irrebuttable presumption to establish an element of the crime.

The Supreme Court has held that:

> [T]here are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference. (*Stirone v. United States,* 361, U.S. 212, 218 (1960)

The Second Circuit's holding in *United States v. Augello, supra,* 451 F.2d at 1170, upon which the district court relied, that the interstate commerce element is merely "jurisdictional" and therefore not an issue for the jury determination, is erroneous.

The deleterious effect of extortion upon interstate commerce is a crucial element of the Hobbs Act. As the Supreme Court has recently observed:

> . . . the purpose of the bill was "to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion as *defined in the bill.*"
> *[United States v. Culbert,* 435 U.S. 371, 377 (1978) (emphasis in original)

While the presence of interstate commerce gives federal authorities jurisdiction, §1951 requires additionally, as an element of the crime, that the defendants' conduct "affect" that commerce. Congress' use of the words "obstruct, delay or affect" means that it intended proof of something more than the presence of interstate commerce. Indeed, Congress might have said "whoever extorts property from anyone involved in interstate commerce," but it did not say that; thus, the language actually used must be given its appropriate significance. *Maze v. United States,* 414 U.S. 398, 405 (1974); *Rewis v. United States,* 401 U.S. 808 (1971); *United States v. Romano,* 382 U.S. 136, 144 (1965); *Tot v. United States,* 319 U.S. 463, 472 (1943); see also *United States v. Bass,* 404 U.S. 336, 345, 350 (1971). Moreover, the "significance of labeling a statutory requirement as 'jurisdictional' is not that the requirement is viewed as outside the scope of the evil Congress intended to forestall, but merely that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." *United States v. Feola,* 420 U.S. 671, 677 n. 9 (1975); see *United States v. Hyde,* 448 F.2d 815, 858 (Rives, J., dissenting).

What *Augello* and similar decisions have done is set up an irrebuttable presumption with respect to an element

of the crime. The presumption is that extortion coupled with the presence of interstate commerce requires a *per se* finding of obstruction or interference with commerce. This results in a violation of due process because it prohibits the jury from considering evidence which may show that the defendant is not guilty. *Screws v. United States,* 325 U.S. 91, 107 (1945). Judge Nickerson in fact told the defense lawyers that they could not argue the issue in summation. While the attorneys did argue the issue, the court's charge effectively instructed the jury to disregard the defense arguments. The instructions that the court gave did not merely shift the burden of proof to the defendants (see *Mullaney v. Wilbur,* 421 U.S. 684, 702-703 n. 31 (1975), but operated as a conclusive presumption—"an irrebuttable direction by the court to find [an effect on interstate commerce] once convinced of the facts triggering the presumption." *Sandstrom v. Montana,* 442 U.S. 510, 517 (1979). As in *United States v. United States Gypsum Co.,* 438 U.S. 422 (1978)* and *Morissette v. United States,*

* In Gypsum, where the defendants were charged with criminal violations of the Sherman Act, the trial court charged:

> "The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices then the parties to them are presumed, as a matter of law, to have intended that result." (*438 U.S., at 430*)

Reversing the conviction, the Supreme Court held:

> Although an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, the jury must remain free to consider additional evidence before accepting or rejecting the inference . . . . [U]ltimately the decision on the issue of intent must be left to the trier of fact alone. The instruction given invaded this factfinding function [Id., at 446].

342 U.S. 246 (1952), the presumption "conflict[ed] with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime and 'invade[d] [the] factfinding function which in a criminal case the law assigns solely to the jury." *Sandstrom v. Montana, supra,* 442 U.S. at 523.

A due process violation may be avoided by following the lead of other Circuits, which have upheld or suggested instructions which leave to the jury the issue of whether the prosecution has proven an effect on commerce. Thus, the Third Circuit has approved the following permissive inference: "it is the *depletion of the resources of a business* by extortion which permits as a reasonable inference if the extortion is established that its operations are delayed, obstructed, affected." *United States v. Addonizio, supra,* 451 F.2d at 77 and n. 34 (emphasis in original). In an *en banc* decision, the Seventh Circuit has upheld instructions that required the jury to find, in order to render a conviction, that the prosecution had proven a "realistic probability" that the extortion would affect commerce or that the "natural effect" of the transaction would be to affect commerce. *United States v. Staszcuk,* 517 F.2d 53, 60 and n. 18 (7th Cir. *en banc* 1975). The Fifth Circuit Pattern Instruction No. 33 includes the following:

> While it is not necessary to prove that the Defendant specifically intended to interfere with interstate commerce, it is necessary as to this issue that the Government prove that the natural consequences of the acts alleged in the indictment would be to delay, interrupt or adversely affect "interstate commerce," which means the flow of commerce or business activities between two or more states.

Similarly, in Federal Jury Practice and Instruction 423-424 (3d ed. 1977), Devitt and Blackmar conclude that "[i]t is better to set forth the specific effects set out in the indict-

ment and supported by evidence, and then instruct the jury that it may find the required interstate element if it finds that any one of these has been established."

The use of a conclusive presumption was especially prejudicial in the instant case because throughout the proceeding the defense argued that the Government had failed to prove any effect upon interstate commerce. Though no objection was taken to the charge, the defense position—that the issue of effect on commerce was a jury question—was clearly brought to the Court's attention. Furthermore, as in *United States v. Rodriguez,* 465 F.2d 5, 8-9 (2d Cir. 1972), a sufficient objection was made by the defense's motion to dismiss the indictment on the ground that the Government had failed to prove this element. In any event, the removal of an element of the crime from the jury's consideration mandates a reversal of the conviction. The Courts have repeatedly found "plain error" in the failure of the trial court to charge an essential element of the crime (*United States v. Fields,* 466 F.2d 119, 121 (2d Cir. 1972) and has even noticed the error when not raised by the defendants on appeal (*United States v. DeMarco,* 488 F.2d 828, 832 (2d Cir. 1973); *United States v. Alsondo,* 486 F.2d 1339 (2d Cir. 1973); see *United States v. Bosch,* 505 F.2d 78, 81-82 (5th Cir. 1974) (reversed for failure to instruct on elements of the offense though "defense counsel participated and acquiesced in each of the actions challenged"); see also *United States v. Robinson,* 545 F.2d 301, 306 (2d Cir. 1976) ("Although defense counsel failed to object to the 'natural and probable consequences' charge, we cannot presume a waiver of Robinson's rights under *Mullaney v. Wilbur, supra,* from the silent record").

Because of the constitutional infirmity in the charge, the conviction must be reversed and a new trial ordered.

POINT III

THE FIFTH AND SIXTH AMENDMENT RIGHTS OF THE PETITIONER, JULIUS CALDER, WERE VIOLATED BY THE ADMISSION INTO EVIDENCE AT THE TRIAL OF THE INCRIMINATING STATEMENTS MADE BY HIM TO AN UNDISCLOSED GOVERNMENT INFORMANT WHILE IN CUSTODY

The examination of the witness, Bennett, revealed the following facts:

1. That the Appellant, Julius Calder, had already been arraigned and had an attorney (1010-1011).

2. That Bennett was in the process or had already made a deal with the government to reduce his sentences (1040, 1047).

3. That the written agreement between the government and Bennett encompassed all information relative to any and all crimes which may come to his knowledge (1014).

4. That Bennett was still working on his deal with the government at the time that he met Calder on November 1 (1047).

5. That Bennett would do anything that he could to get his State robbery count of a possible 25 year sentence reduced (1045).

The leading case of *Massiah v. U.S*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) held as follows:

> "We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel. It is true that in the Spano case the defendant was interrogated in a police station, while here the damaging testimony was

> elicited from the defendant without his knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals, 'if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent." (377 U.S. at 206).

In the case at bar, it was anticipated that the government did take the position that Bennett was not a government agent. That his fortuitous presence at the MCC on November 1; and, that his chance meeting with the appellant, Calder, was not arranged by the government. It is respectfully submitted that such reasoning is specious.

The five (5) points raised at the beginning of this Point Clearly show that Bennett was an active government informant willing to do anything and everything, by virtue of his agreement with the Government, to enhance his position with the office of the United States Attorney. It is respectfully submitted that it would not be speculative to imagine that had Bennett had the opportunity to talk to *anyone* at the MCC, he would have revealed said conversations, if incriminating, to government officials. That is to say, Bennett was an active informant, whose every act would be to give information to the government. Talking to Bennett would be the same as talking through an eavesdropping device with a direct line to the United States Attorney's Office.

In the leading case, *U.S. v. Henry*, ___U.S.___ 27 Cr. L. 3155, (June 16, 1980), the U.S. Supreme Court affirmed the reversal of a conviction on facts extremely similar to the case at bar.

In *Henry, supra*, an inmate, one Nichols, who was a paid informant, was alerted to listen to any statements made by prisoners regarding the charges against them. Nichols was told not to initiate any conversations, but to pay attention to information furnished; *27 Cr. L. 3156.*

"The court noted that Nichols had engaged in conversation with Henry and concluded that if by association, by general conversation, or both, Nichols had developed a relationship of trust and confidence with Henry such that Henry revealed incriminating information, this constituted interference with the right to the assistance of counsel under the Sixth Amendment." *27 CrL 3157.*

In *Henry, supra,* the U.S. Supreme Court noted that the Court of Appeals reviewed the record as showing that Nichols deliberately used his position to secure incriminating information from Henry when counsel was not present and held that conduct attributable to the government. *27 CrL 3157.*

An examination of the holding of the Court of Appeals in *Henry v. U.S.,* 590 F.2d 544 (4th Cir.—1978) reveals the following principle of law:

"Subsequently, several courts held that Massiah did not apply to all incriminating statements obtained by government agents after indictment and in the absence of counsel, but only to those statements induced by such agents. This refinement was summarily rejected by the Supreme Court in two per curiam opinions, McLeod v. Ohio, 381 U.S. 356, 85 S. Ct. 1566, 11 L.Ed. 2d 682 (1965), and Beatty v. United States, 889 U.S. 45, 88 S. Ct. 234, 19 L.Ed. 2d 48 (1967) McLeod reversed a state court holding that Massiah was not applicable absent questioning or deception. Similarly, Beatty overturned the Fifth Circuit's determination that information volunteered to an unknown government informer was admissible despite Messiah. The facts of this case would be identical to those in Beatty except that Beatty was not in jail at the time of the interception. Because of the restrictive nature of the jailhouse setting, the instant case presents a far more compelling situation for the application of the Massiah rule." *Id. at p. 564.*

It is clear, that the damaging nature of any confession or admission to a trial jury is of such a nature to rise to the

degree of plain error.

The Court of appeals, in Henry, supra, found that there was other evidence introduced linking Henry to the crimes, but even so, the Court could not say that beyond a reasonable doubt Nichols' testimony did not influence the jury's verdict. *Id. 590 F.2d at page 547.* It is respectfully submitted that the concluding remarks of the Supreme Court in *Henry, supra,* is applicable to the case at bar:

> "When the accused is in the company of a fellow inmate who is acting by prearrangement as a government agent the same cannot be said. Conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be government agent. Indeed, the Massiah Court noted that if the Sixth Amendment "is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." The Court pointedly observed that Massiah was more seriously imposed upon because he did not know that his codefendant was a government agent." *27 CrL 3158.*

It is respectfully submitted that the appellant, Julius Calder's Fifth and Sixth Amendment Rights were violated by the incriminating statements made by him while in custody.

CONCLUSION

FOR THE ABOVE REASONS, A WRIT OF CERTIORARI SHOULD BE ISSUED TO REVIEW THE JUDGMENT ORDER AND DECISION OF THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 353, 382, 476, 477—September Term, 1980

(Argued November 13, 1980

Decided February 10, 1981)

Docket Nos. 80-1245, 1247, 1249, 1281

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH CALDER, JULIUS CALDER, THOMAS DIDONATO and GEORGE MONGE,

Appellants.

Before:

WATERMAN, MANSFIELD and VAN GRAAFEILAND,

Circuit Judges.

Appeals from judgments convicting Joseph Calder, Julius Calder, and George Monge on two counts of obstruction of commerce by extortion and one count of conspiracy and Thomas DiDonato on one count of conspiracy, following a jury trial before Judge Nickerson in the United States District Court for the Eastern District of New York. Appellant Monge also asserts that the District Court erred in imposing sentence upon him. Affirmed in all respects.

KENNETH KAPLAN, New York, N.Y. (Kaplan & Katzberg, New York, N.Y., *for Appellant JOSEPH CALDER*

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BARRY BASSIS, New York, N.Y. (Legal Aid Society, Federal Defender Services Unit, New York, N.Y.), *for Appellant GEORGE MONGE*

EDWARD R. KORMAN, United States Attorney, Eastern District of New York (Thomas P. Puccio, United States Department of Justice, Attorney-in-Charge; Kenneth F. McCallion, Joel Cohen, Special Attorneys, of Counsel), *for Appellee UNITED STATES OF AMERICA*

VAN GRAAFEILAND, *Circuit Judge:*

This case involves the extortion of money from two bars with the descriptive names of "Guys and Dolls" and "Adam and Eve", located in midtown Manhattan. The proof, which we must view in the light most favorable to the Government, shows that, beginning in September 1978, Joseph Calder, accompanied by George Monge, extorted $300 weekly from each of these bars. There was evidence that the extortion continued for over a year, the take from each bar totalling approximately $15,000.

Eventually, the FBI was called upon for help, and it devised a plan to halt the extortion and to apprehend those responsible for it. The gist of this plan was that FBI agents would pose as members of a rival gang attempting to shake down the same bars. Through this ruse, the Government secured ample, properly-admitted evidence tying Joseph Calder's brother Julius and Thomas DiDonato to the extortion scheme.[1] On the night of October 31, 1979, all four appellants were arrested while in a car parked outside the Adam and Eve. Joseph Calder had just collected the weekly $300 payment and had informed the manager that he and DiDonato "would be around from now on" to pick up the money. Monge was carrying a pistol, and a baseball bat was found in the back seat of the car.

Appellants were convicted under the Hobbs Act, 18 U.S.C. § 1951, which makes federal offenses of robbery, extortion, and conspiracy to rob or extort, if they "in any way or degree" affect interstate commerce. The Calder brothers and Monge were convicted on two substantive counts and one conspiracy count; DiDonato was convicted on only the conspiracy count. Their principal argument on appeal is that the evidence was insufficient to show the impact on interstate commerce required by the statute and that District Judge Nickerson erred in instructing the jury on this point. We find no merit in either contention.

The Government proved that both bars purchased food and other items from firms in New Jersey, and that Adam

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1 We find no merit in appellant DiDonato's argument that the evidence was insufficient to establish that he was a conspirator in the extortion scheme. His own statements showed him to be a person of authority in the extortion group, and this evidence was buttressed by properly-admitted testimony of his fellow conspirators.

and Eve, a "juice bar" without a liquor license, purchased de-alcoholized wine from a Canadian company. Extortion's effect upon such interstate commerce need only be minimal to give rise to Hobbs Act jurisdiction. *United States v. Augello,* 451 F.2d 1167 (2d Cir. 1971), *cert. denied,* 405 U.S. 1070 (1972). "Given the sweeping power of Congress under the Commerce clause, . . . particularly evident in the Hobbs Act, . . . it is enough that the extortion 'in any way or degree' . . . affects commerce, though its effect be merely potential or subtle." *Id.* at 1169-70 (citations omitted). Here, the resources of each bar were depleted by $15,000 in a period of one year. There can be little question that this depletion was sufficiently deleterious to the efficient operation of these establishments to affect, albeit potentially or subtly, their interstate transactions. This was sufficient to sustain Hobbs Act jurisdictions. *See United States v. Daley,* 564 F.2d 645, 649-50 (2d Cir. 1977), *cert. denied,* 435 U.S. 933 (1978).

Judge Nickerson instructed the jury that if it found "beyond a reasonable doubt that the goods were purchased for 'Adam and Eve' and 'Guys and Dolls' in interstate or foreign commerce and that money or property was obtained from them by extortion, then, as a matter of law, interstate or foreign commerce was affected." The substance of this charge has been approved in this and other circuits on numerous occasions. *See, e.g., United States v. Augello, supra,* 451 F.2d at 1170; *United States v. Cerilli,* 603 F.2d 415, 423-24 (3d Cir. 1979), *cert. denied,* 444 U.S. 1043 (1980). It was for the court to determine as a matter of law the jurisdictional question of whether the alleged conduct affected interstate commerce; it was for the jury to determine whether the alleged conduct had in fact occurred. *See United*

States v. Ricciardi, 357 F.2d 91, 94 (2d Cir.), *cert. denied,* 384 U.S. 942 (1966).

The only other challenge to the verdict which merits comment involves the admission of certain evidence against Julius Calder. Julius Calder spent the day following his arrest in the Metropolitan Correctional Center where he met a fellow inmate, Joseph Bennett. During a conversation with Bennett, Calder admitted that he had been shaking down a topless bar in Manhattan. Bennett had been indicted for conspiracy to transport stolen motor vehicles in interstate commerce. Although Bennett's attorney had discussed with the United States Attorney the possibility that his client might cooperate in the stolen car case, no cooperation agreement was entered into until November 16, 1979, some two weeks after the conversation between Calder and Bennett.

Citing *United States v. Henry,* 48 U.S.L.W. 4703 (June 16, 1980), Calder argues that his Fifth and Sixth Amendment rights were violated when the incriminating statement was admitted into evidence. We disagree. The Supreme Court held in *Henry* that the Government had deliberately elicited a jailhouse admission made by the appellant to a fellow inmate who was a paid informer working on a contingent fee basis. While holding the testimony of the informer to be inadmissible, the Court implicitly approved the admission of similar incriminating testimony by another of Henry's cell mates who was not a paid informer and had no arrangements to report on conversations with Henry. *Id.* at 4704 n.3 and 4706 n.13. Bennett was not acting as a Government agent when he talked with Calder. Like the neutral witness in *Henry,* he was not disqualified.

Appellant Monge was fined $5,000 on Count One and sentenced as a youth offender to seven years in the

custody of the Attorney General. Sentence was suspended on Count Two, and Monge was placed on probation for five years consecutive to Count One. Sentence also was suspended on Count Three, and Monge was placed on probation for three years consecutive to Count Two. Appellant Monge contends that the sentence under Counts Two and Three were improper.

In making this argument, Monge relies upon Ninth and Tenth Circuit holdings, which require sentences imposed on youth offenders under multi-count indictments to be consistent in order not to thwart the rehabilitative intent of the Youth Corrections Act. *See United States v. Magdaleno-Aquirre,* 590 F.2d 814, 815 (9th Cir. 1979); *United States v. Ortiz,* 513 F.2d 198 (9th Cir.), *cert. denied,* 423 U.S. 843 (1975); *Roddy v. United States,* 509 F.2d 1145, 1147 (10th Cir. 1975); *Price v. United States,* 384 F.2d 650, 652 (10th Cir. 1967). In *United States v. Ortiz,* the twenty-one year old defendant was sentenced under 18 U.S.C. § 5010(b) on a narcotics conspiracy count and was given a consecutive five-year sentence as an adult on the companion substantive count, with the sentence suspended and the defendant placed on probation. The court vacated the five-year sentence, holding that it was inconsistent for the district judge to treat the defendant as an adult, after having found by implication that he would derive benefit from the rehabilitative treatment to be provided under the Youth Corrections Act.

The reasoning of the foregoing cases is not without merit. However, it does not apply to our case. Judge Nickerson did not impose sentence under Counts Two and Three. He suspended the imposition of sentence and simply placed the defendant on consecutive terms of probation. This he was permitted to do by the express language of the Act.

Section 5023 provides that nothing in the Act "shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation . . . ." It also provides that the Act shall not be construed to repeal or amend the provisions of the general probation chapter, section 3651 of which permits a court to suspend the imposition or execution of sentence and place the defendant on probation. *See Durst v. United States,* 434 U.S. 542, 543-44, 549-50 (1978); *United States v. Buechler,* 557 F.2d 1002, 1006 (3d Cir. 1977).

Commitment under sections 5010(b) and 5010(c) is "in lieu of the penalty of imprisonment otherwise provided by law." *Durst v. United States, supra,* 434 U.S. at 552. When a court imposes probation and suspends the imposition of sentence, he is not sentencing the defendant to prison. In the strict sense of the word, he is not "sentencing" the defendant at all. *See Dunn v. United States,* 561 F.2d 259, 261 (D.C. Cir. 1977); *United States v. Chappell,* 480 F. Supp. 321, 324 (W.D. Okla. 1978). Assuming, for the argument, that sentences imposed on all counts in a youth offender case must be consistent, it does not necessarily follow that sentence must be imposed on all counts. The imposition of probation may be a proper exercise of the "flexibility [allowed a district judge] in choosing among a variety of treatment settings and programs tailored to individual needs." *Durst v. United States, supra,* 434 U.S. at 545. Like the fines and orders of restitution approved by the Court in *Durst,* suspension of sentence and probation may, in a particular case, be consistent with the rehabilitative intent of the Act.

The judgments are affirmed.

MANSFIELD, *Circuit Judge* (Concurring in part and dissenting in part):

I concur in all of Judge Van Graafeiland's carefully considered and well-reasoned opinion except that portion upholding the district court's placement of defendant Monge on probation for periods beyond the seven-year term imposed upon him as a youth offender pursuant to 18 U.S.C. § 5010(c).[1] In my view the court was precluded by 18 U.S.C. § 5017(d)[2] from placing Monge on probation for the additional periods totalling five years beyond the seven-year term.

The district court was clearly authorized by § 5010(c) to impose a seven-year prison term on Monge. Indeed Judge Nickerson could pursuant to § 5010(c) have imposed concurrent terms upon Monge as a youth offender of up to 20 years on Counts 2 and 3, as authorized by 18 U.S.C. § 1851. In the alternative, the district court could pur-

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1 Section 5010(c) provides:

"(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter."

2 Section 5017(d) provides:

"(d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction."

suant to § 5023[3] have suspended the imposition or execution of sentence and placed Monge as a youth offender on probation. However, once the district court chose to impose a prison sentence on Monge, the sentence became subject to the terms of § 5017(d), which provides that a youth offender "shall be discharged *unconditionally* on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction." (Emphasis supplied).

As Judge Van Graafeiland correctly notes, the imposition of probation under Counts 2 and 3 for terms extending beyond the seven-year sentence imposed on Monge as a youth offender under Count 1 was not strictly a "sentence" of the defendant. However, it clearly placed a "condition" on the discharge of Monge upon expiration of the maximum sentence (seven years) imposed on him as a youth offender under Count 1. The probation terms therefore violated § 5017(d).

I would vacate the probation terms imposed on Monge on Counts 2 and 3 and remand the case for sentencing on these two counts. Upon such a remand Monge would face the risk that Judge Nickerson, upon learning that he was powerless to impose probation consecutively to the discharge of Monge as a youth offender, might decide that he was justified under the circumstances in imposing prison terms on these counts exceeding the seven-year period imposed on Count 1. See *North Carolina v. Pierce*, 395 U.S. 711 (1968).

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3 Section 5023(a) provides:

"(a) Nothing in this chapter shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 of this title or the Act of June 25, 1910 (ch. 433, 36 Stat. 864), as amended (ch. 1, title 24, of the D. of C. Code), both relative to probation."

JUDGMENT AND PROBATION COMMITMENT ORDER

* * *

Plea Guilty, and the court being satisfied that there is a factual basis for the plea,

There being a finding/verdict of Guilty to counts one, two and three.

Finding & Judgment:

Defendant has been convicted as charged on the offense of violating Title 18, U.S.C., Sections 1951 and 2, in that from in or about September 1978, to on or about October 31, 1979, both dates being approximate and inclusive, within the Eastern District of New York, and elsewhere, the defendant, together with others, did knowingly, wilfully and unlawfully, combine, conspire, confederate and agree to and, did, obstruct, delay and affect commerce, as that term is defined in Section 1951(b)(3) of Title 18, U.S.C., and the movement of articles and commodities in commerce, by extortion.

Sentence or Probation Order:

The Court asked whether defendant had anything to say why judgment should not be performed. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of seven (7) years on counts one and two concurrent and a fine of Ten Thousand Dollars ($10,000.00) concurrent. Imposition of sentence is suspended on count three, and defendant is placed on probation for five (5) years consecutive to counts one and two. Execution of sentence stayed pending appeal.

Additional Conditions of Probation: